



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-372

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Sag Harbor Union Free School District

Appearances:

Littman Krooks, LLP, attorneys for petitioners, by Kevin Pendergast, Esq.

Volz & Vigliotta, PLLC, attorneys for respondent, by Thomas M. Volz, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their daughter's tuition and expenses at the Landmark School (Landmark) for the 2021-22, 2022-23, and 2023-24 school years. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this matter attended district public schools from second grade (2014-15 school year) through eighth grade (2020-21 school year) (see Parent Ex. HH at p. 6).^{1, 2} During the 2019-20 school year, as a seventh grade student eligible to receive special education as a student with a learning disability, the student's special education program consisted of a general education placement with daily, integrated co-teaching (ICT) services for instruction in English language arts (ELA) (five 40-minute sessions per week); direct, individual reading instruction (one 40-minute session every other day); and supplementary aids, services, and program modifications including the use of a graphic organizer, modified homework assignments, preferential seating, and access to a word processor as set forth in her March 2019 IEP (see Dist. Ex. 4 at pp. 1, 5). According to the CSE meeting minutes in the March 2019 IEP, the recommendation for access to a word processor addressed the student's need to "increase the likelihood of her editing and initiating written tasks" (id. at p. 1). At the time of the March 2019 CSE meeting, the student had "achieved her goal of fluency at the rate of 160 words per minute" and she had "mastered level I 'Red Level' irregular words and next year w[ould] be expected to master Level II" (id.).

At the impartial hearing, the district's former director of pupil personnel services who retired from the district in or around November 2022 (former director), testified that, as a result of the COVID-19 pandemic, "in-person instruction was moved to remote instruction" due to school building closures in or around March 2020, "including special education" instruction (Tr. pp. 42-44, 47, 80-81, 248). The former director testified that remote instruction brought several challenges to the district, including participation and social/emotional struggles for students (see Tr. pp. 81-82).

As reflected in the student's final progress report for her annual goals for the 2019-20 school year, the student had achieved her spelling goal prior to the school building closures due to the COVID-19 pandemic in March 2020, and she continued to progress satisfactorily on her reading fluency goal throughout the school year (see Parent Ex. F at pp. 1-2; Dist. Ex. 4 at p. 4). The student's report card for the 2019-20 school year, which reflected grades for the first and second marking periods, revealed averages that ranged from a low of "68" in mathematics for the second marking period to a high of "100" in "Home & Careers 7" (first marking period), physical education (both marking periods), and in "PLANT II" (second marking period) (Dist. Ex. 23). Overall, the student received a grade point average of "89.22" for the first marking period and a

¹ In February and March 2018, the parents referred the student for an evaluation (March 2018 Dyslexia Evaluation) (see Dist. Ex. 17 at p. 1). At that time, the parents reported a "family history [that wa]s significant for dyslexia" and that the student "appear[ed] to struggle to read fluently" (id.). As a result of the evaluation, the student was diagnosed as having a "Specific Learning Disorder with Impairment in Reading (Reading Fluency; i.e. Surface Dyslexia)" and the evaluator included recommendations "designed to improve the orthographic aspects of reading," and specifically noted that "[i]nterventions that emphasize[d] decoding strategies and phonological aspects of reading should not be used" because the student did not "demonstrate weaknesses in these areas" (id. at p. 8 [emphasis in original]).

² The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is his or her responsibility to exclude evidence that the IHO determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

grade point average of "87.56" for the second marking period (*id.*). The student's report card did not include any grade point averages for the third and fourth marking periods; however, it did reflect that the student received a "P" (presumably for "Pass") as a final grade in all of her courses and that she received a grade point average of "100" in both "Home & Careers 7" and in physical education, as well as a grade point average of "99" in "PLANT II" (*id.*).³

For eighth grade, during the 2020-21 school year, the student received special education pursuant to an IEP developed at an annual review held on May 14, 2020 (May 2020 IEP) (*see* Parent Ex. E at p. 1). Specifically, the May 2020 IEP included recommendations for the student to attend a general education placement with daily ICT services for instruction in ELA (five 40-minute sessions per week); direct, individual reading instruction (one 40-minute session every other day); supplementary aids and services, program modifications, and accommodations, which included the use of a graphic organizer, preferential seating, and access to a word processor; and testing accommodations (extended time, location with minimal distractions, and prompts to recheck responses) (*id.* at pp. 1, 5-6). Annual goals in the May 2020 IEP targeted the student's reading skills, such as "spelling of irregularly spelled words (Orton Gillingham Red Words—Level 4)"; applying "conventional spelling rules appropriately, when encoding regularly spelled [two to three] syllable words in isolation, including common prefixes and suffixes"; and increasing her ability to "answer inferential and evaluative questions to demonstrate understanding about what [wa]s being read, at her instructional reading level" (*id.* at p. 4).⁴ The May 2020 IEP also included the following strategy to address the student's management needs: "the support of a specially designed, multi-sensory reading program that allow[ed] her to remediate her reading weaknesses" (*id.* at p. 3).

Prior to the start of the 2020-21 school year, the parents' opted for the student to begin attending school via fully remote instruction due to family health concerns (*see* Dist. Ex. 35 at pp. 4-5). In communications with the district middle school principal (principal) concerning remote instruction, the parents requested the student's inclusion in a specific cohort, which included the student's sibling, as well as her inclusion in specific courses to align with her sibling's schedule (i.e., "Living Environment") (*id.* at pp. 3-5). The parents also suggested that the student's recommended ICT services should be disregarded, opining that "it d[id] not work under these circumstances" (*id.* at pp. 2-3). In response, the principal indicated that she could not honor the

³ The evidence in the hearing record also includes a copy of a "Progress Report" for the student's third marking period, which extended from January 27, 2020 through March 6, 2020 (Dist. Ex. 25 at pp. 1-2).

⁴ In the May 2020 IEP, the student's instructional reading level was reported as a "level X (Fountas & Pinnell Leveled Literacy Intervention)," which correlated to a "mid-sixth grade" level (Parent Ex. E at p. 2). It was also noted in the May 2020 IEP that the student then-currently read "147 words per minute at her instructional reading level" and had "mastered the decoding of all 44 phonemes of the English language in isolation and applie[d] these skills when reading single words and passages" (*id.*). The May 2020 IEP also indicated that the student made "significant progress with reading and spelling irregular words (Orton Gillingham Red Words)" and had "mastered all level 2 and 3 Red Words" and was then-currently "working towards mastery of level 4 words" (*id.*). In the area of writing, the May 2020 IEP noted that the student's written expression had improved over the past year, and she could "express her ideas clearly in her writing" and "benefit[ed] from the use of graphic organizers as part of the planning process when preparing for writing assignments" (*id.*).

parents' specific cohort requests for remote instruction, and if the parents wished to amend the student's IEP or "decline her services," they would need to contact the former director (id. at p. 1).

As suggested by the principal, the parents reached out to the former director seeking to amend the student's IEP so that the student could "work in a cohort" during remote instruction (Dist. Ex. 36 at pp. 3-4). The former director responded, and instructed the parents to submit, in writing, the "specific services" they were declining; the parents thereafter indicated that they declined the student's ICT services and "modified homework assignments" (id. at pp. 2-3).

Further communications between the parent and the former director in October 2020 reflect the parent's request for additional modifications to the delivery of the student's reading instruction via remote instruction (see Dist. Ex. 37 at pp. 4-5; see also Dist. Ex. 38).⁵ The former director indicated that in order to grant the parent's requests, the parent would be declining the student's ICT services for instruction in ELA, and that, at that time, the student was "currently failing ELA and ha[d] several assignments due" (Dist. Ex. 37 at p. 3). The parent acknowledged this information, and the former director indicated that the parent would need to decline the student's IEP services in writing (id. at pp. 1-2).

In a "Special Education Remote Learning Schedule" dated November 20, 2020, the district informed the parents that the student would receive additional supports, including the use of a Chromebook and "direct 1:1 support every other day by remote link" from a special education teacher (Dist. Ex. 7 at p. 1). In addition to the support from the special education teacher, the student's remote special education program included direct, 1:1 reading instruction every other day (i.e., opposite the support from the special education teacher) (id.).⁶

At the impartial hearing, the former director testified that, at some point during the 2020-21 school year, concerns arose with respect to the student's participation in remote instruction (see Tr. p. 113). Specifically, it was brought to her attention that the "student wasn't turning on the camera or may not have logged in" and "[t]eachers weren't sure if she was participating" (Tr. p. 114). In addition, the former director testified that the student's attendance was a concern, as well as a "lack of response[s] to engage in remote sessions" (id.). She also testified, however, that "participation concerns" during this timeframe were not "limited" to this student, and overall, the student's difficulties with participation, or the lack thereof, did not warrant the attention of a CSE or special education interventions (Tr. pp. 115-17).

On February 24, 2021, a CSE convened pursuant to the parents' request (see Dist. Ex. 8 at p. 1). At that time, the parents expressed concerns regarding the student's ability to spell irregular words and her "executive functioning [and] organizational skills" (id.). As a result of the meeting, the February 2021 CSE recommended the addition of resource room on alternate days to the

⁵ Any and all references to the "parent" in this decision corresponds with the student's mother (see, e.g., Dist. Ex. 37).

⁶ Notwithstanding the parent's request to decline the student's ICT services for ELA, it appears that the student continued to receive ICT services during the 2020-21 school year, as it appeared on her schedule in November 2020 (see Dist. Ex. 7 at p. 2).

student's program (*id.* at pp. 1, 6).⁷ According to the February 2021 IEP, the district had been providing the student with "direct one to one tutoring after school" in addition to the services outlined in the "Special Education Remote Learning Schedule" and the special education recommended in the student's IEP (*id.* at p. 1). The February 2021 CSE noted the student's waning participation in the "additional one to one remote during school support" in the IEP by comparing her attendance prior to and after break, and further noted that the student did not respond to requests to participate (*id.*). At the CSE meeting, the student's ELA teacher and her reading teacher both discussed the student's progress, with the reading teacher also noting that the student demonstrated difficulty "generalizing irregularly spelled words taught in isolation" (*id.*). It was also noted that, at that time, the student accessed "grade level texts" and wrote "on grade level" (*id.*). In addition, the CSE documented that the student's "instructional reading level was reported at [a] 7th grade level" (*id.*). According to the IEP, the student had been interviewed prior to the meeting, and the student indicated that she "benefit[ed] from more general support with organizing and getting her work done and that she preferred not to work with the Special Education teacher that was assigned for the additional support during the school day" (*id.*). The student also reported that she would be "willing to participate in tutoring over the summer if it was offered" (*id.* at pp. 1-2). After further discussions, the February 2021 CSE noted that the "remote learning setting did not seem ideal for [the student's] learning style and offered summer tutoring," which the parents "declined" (*id.* at p. 2). Finally, the February 2021 CSE, with the exception of the parents, agreed that adding "resource room support every other day" was appropriate "to support [the student's] executive functioning needs and generalizing skills learned in her [d]irect [r]eading sessions" (*id.*). In disagreeing with the CSE, the parents indicated that the "support needed to be provided 1:1 and [to] support additional [d]irect [r]eading every other day" (*id.*).

In preparation for the student's upcoming annual review meeting, the CSE referred the student for a reevaluation, which was conducted by a district school psychologist over the course of two days in April 2021 (April 2021 psychoeducational evaluation) (*see* Dist. Ex. 19 at pp. 1, 14). As background information gleaned, in part, from the parent, the April 2021 psychoeducational evaluation report noted the student's difficulty completing homework and her resistance to others' efforts "to help her" (*id.* at pp. 1-2). According to the evaluation report, the parent indicated that the student had difficulty during the COVID-19 pandemic and she "ha[d] become more anxious," but was "receiving counseling" (*id.* at p. 2).

According to the April 2021 psychoeducational evaluation results, the student's "Full Scale IQ score of 89, plac[ed the student] in the low average range of cognitive ability" (Dist. Ex. 19 at p. 12). However, due to the variability in the student's performance, the evaluator indicated that the student's performance was "better represented by [] her index scores," as opposed to a "single Full Scale IQ score" (*id.* at pp. 12-13). Testing results revealed that the student obtained average scores within her verbal comprehension, visual spatial, and fluid reasoning skills, along with a working memory score in the "low average range" and a processing speed score in the "extremely

⁷ In the February 2021 IEP, the CSE described the delivery of the resource room program as occurring in a group of five students "to address executive functioning/organizational skills a[n]d to generalize reading skills learned in isolation" (Dist. Ex. 8 at p. 6). At the impartial hearing, the former director acknowledged that the February 2021 IEP did not specifically identify that writing would be addressed in resource room, but she indicated "[i]t was a discussion at the CSE meeting" (Tr. pp. 417-19). The former director further testified that the skills addressed in resource room "depend[ed] on what [the student] work[ed] on in the classroom" (Tr. p. 421).

low range" (id. at p. 13). The evaluator opined, however, that the student's processing speed score was "more likely a reflection of low motivation, rather than a true weakness" (id. at pp. 6, 13). The evaluator questioned the student's "extremely low score" because, based on the behavioral observations of the student, she "did not appear to be particularly slow in response when asked verbal questions," and the evaluator had consulted with the student's teachers, who indicated the student "sometimes slow[ed] down when she lack[ed] motivation, but [further noted that the student's] classroom behavior did not suggest an overall slow processing speed" (id. at p. 2).

Assessments administered to measure the student's reading skills demonstrated variability, namely, with her word reading, pseudoword decoding, phonological awareness, and reading comprehension skills falling within the average range, but demonstrating more difficulty "when fluency tasks [were] involved" (Dist. Ex. 19 at p. 13). In addition, the student exhibited "weaknesses" in phonemic proficiency, oral reading fluency, orthographic fluency, and decoding fluency, along with a "significant weakness" in spelling (id. at p. 10).

In mathematics, the student's performance "ranged from low average to average" (Dist. Ex. 19 at p. 13). The April 2021 psychoeducational evaluation results indicated that the student "put very little effort into the Numerical Operations subtest," but obtained an "average range performance on the Math Reasoning subtests," which "suggest[ed] that [the student] could have done better" (id. at pp. 11-12). Additionally, the April 2021 psychoeducational evaluation results indicated that the student's "mathematical fluency scores ranged from the borderline to [the] average range" (id. at p. 12).

In writing, the April 2021 psychoeducational evaluation indicated the student wrote "simple . . . grammatically correct" sentences with "several run-on sentences" (Dist. Ex. 19 at p. 12). In addition, the student obtained average sentence building and sentence combining scores and a low average essay composition score (id.). The evaluator noted that the student "completed her essay" in approximately half of the time allotted for the task (i.e., "less than [five] minutes (out of the 10 minutes)") (id.).

Based on the results of the April 2021 psychoeducational evaluation, the evaluator recommended extra time on tests to address the student's weakness in processing speed, strategies for the provision of directions given the student's weakness in working memory, and strategies for pre- and post-writing strategies (see Dist. Ex. 19 at p. 13). Further, the April 2021 psychoeducational evaluation included recommendations that the student "not be penalized for spelling errors on tests," have the use of a calculator to address mathematics fluency difficulties, receive reminders to check her work for errors, and have structured homework time (id. at pp. 13-14).

At the impartial hearing, the former director testified that, in or around April 2021, the student began attending in-person instruction at the school for "direct reading instruction support with the reading specialist" (Tr. p. 193). Based on information reported to the former director, the student's in-person attendance "made a big difference in [her] participation" (id.). In addition, the district had begun implementing the recommendation for resource room support for the student, which was added to the student's IEP at the February 2021 CSE meeting (see Tr. p. 136; Dist. Ex. 8 at p. 1). The former director testified that when the student began receiving in-person instruction

at the district, her reading teacher delivered both the resource room support and her individual reading instruction (see Tr. pp. 136-38).⁸

On May 5, 2021, the student's then-current district special education teacher completed a reference form related to the student's application for admission to Landmark (see Parent Ex. G at pp. 1-2). The special education teacher reported on the form that she had known the student for three years, and provided in-person instruction to the student five days per week in a 1:1 setting (40-minute class periods) (id. at p. 1). The special education teacher also reported that she was working on the following with the student: "irregularly spelled words (spelling), spelling multisyllabic words (strategies), reading complex text inferencing, evaluating text, [and] writing development (structure [and] vocabulary)" (id.). According to the special education teacher, the student responded "very well" to "learning with frequent spiral review and explicit instruction" (id.). In rating her academic traits, the special education teacher identified the student's "Response to Constructive Criticism" as "Good"; her "Academic Motivation," "Study Habits," and "Organization [and] Time M[anagement]" as "Average"; and her "Homework Completion," "Responsibility," and "Self-Confidence" as "Poor" (id.).

Also on May 5, 2021, the parent completed a "Landmark School Application for Admission" for the student (Parent Ex. HH at pp. 1, 13). Within the application, the parent confirmed that the student had received "psychological counseling or therapy" and provided dates of services from March 15, 2021 through April 7, 2021 (id. at p. 7). The parent explained, within the application, that the student had received counseling services because she had been "struggling with remote learning and ha[d] stopped doing her homework," which resulted in the student falling behind; however, the parent also noted that it was "[their] fault as [the student] was put in high level classes" so that she could remain with other students who also received remote instruction (id.). The parent also explained that the student, therefore, "spent a year [in] remote learning in classes that move[d] much too fast" and, as a result, the student's "confidence ha[d] suffered" and she "felt anxious about school" (id.). According to the parent, she wanted the student to "talk about why she [wa]s not completing her homework" because this had not previously been an issue at school (id.). The parent indicated, however, that "[i]n hindsight it [wa]s simply because remote learning d[id] not work for [the student]" and instead, she "need[ed] to be in person" (id.). The parent further indicated that the student's counseling services had recently been terminated because the student was now receiving in-person instruction and she was "doing much better recently" (id.).

⁸ At the impartial hearing, the student's reading teacher testified that the February 2021 CSE had discussed the possibility of having her as both the student's reading teacher and resource room teacher, and that she did, in fact, serve in both roles after the February 2021 CSE meeting (see Tr. pp. 931, 936). The former director testified that the parents had "ask[ed] for [the reading instructor] by name . . . to deliver the instructional program or service" because she provided the "multisensory approach to instruction" (Tr. p. 125). The reading teacher testified that the student's resource room "was delivered [] one-on-one" even though the recommendation in the February 2021 IEP was for resource room to be delivered in a group of five (see Tr. p. 936). The reading teacher further testified that resource room was initially provided remotely to the student, but then the student began to attend direct reading instruction and resource room in person (see Tr. pp. 941-43).

On May 26 and June 7, 2021, the student underwent a psychoeducational IEE (see Parent Ex. K at p. 1).⁹

On May 28, 2021, the parent executed a "Landmark School, Inc. Enrollment Agreement" for the student's attendance at Landmark for the 2021-22 school year in its "Academic Residential" program, which was scheduled to begin in August 2021 and conclude in June 2022 (Parent Ex. Y at pp. 1, 9). It appears from the enrollment agreement that the parent submitted the executed enrollment contract to Landmark on June 7, 2021 (id. at p. 1).

On June 24, 2021, a CSE convened to conduct the student's annual review and to develop an IEP for the student for the 2021-22 school year (ninth grade) (see Parent Ex. J at p. 1).¹⁰ Finding that the student remained eligible to receive special education as a student with a learning disability, the June 2021 CSE recommended a general education placement with daily ICT services for instruction in both ELA and social studies (five 40-minute sessions per week in each); direct, individual reading instruction (one 40-minute session every other day); resource room in a group (one 40-minute session every other day); supplementary aids and services, program modifications, and accommodations, which included the use of a graphic organizer, preferential seating, access to a calculator, and access to a word processor; and testing accommodations (extended time, location with minimal distractions, and prompts to recheck responses) (id. at pp. 1, 6-7).¹¹ In addition, the June 2021 CSE recommended a 12-month program for July and August 2021, which consisted of five 60-minute sessions per week of an individual resource room program (id. at pp. 1, 7).¹²

As reflected in the June 2021 IEP, the CSE discussed the student's April 2021 psychoeducational evaluation as part of the annual review (see Parent Ex. J at pp. 1-3). The June 2021 CSE noted in the IEP that the student had "work[ed] remotely for the entire school year until April," at which point the "family agreed to" in-person learning solely for the delivery of the student's individual "[r]eading and [r]esource room" services (id. at p. 1). The June 2021 IEP also indicated that the student was "absent from all other classes 63 [percent] of the time" (id.). According to the IEP, the "report of a recent [IEE] had not been received" at the time of the meeting

⁹ Although the psychoeducational IEE was conducted by the same psychological diagnostic group that completed the March 2018 dyslexia evaluation, the psychoeducational IEE was performed by a different evaluator (compare Dist. Ex. 17 at pp. 1, with Parent Ex. K at p. 1).

¹⁰ At the impartial hearing, the parent testified that she requested an IEE after the district conducted its reevaluation of the student in April 2021, and the psychoeducational IEE report was not available at the time of the June 2021 CSE meeting (see Tr. pp. 1474-75).

¹¹ In the June 2021 IEP, the CSE described the delivery of the resource room program as occurring in a group of five students "to address executive functioning/organizational skills a[n]d to generalize reading skills learned in isolation" (Parent Ex. J at p. 6).

¹² The June 2021 IEP reflected that the CSE "discussed and offered compensatory academic support over the summer due to [the student's] marked lack of engagement in remote instruction but the [p]arent[s] declined" (Parent Ex. J at p. 1).

(id.).¹³ The June 2021 IEP indicated that the CSE reviewed the student's "current level of performance and progress towards goals and updated the goals," but the "[p]arent declined input regarding her perspective on progress, programming, and services," and "instead defer[ed to] the Committee members" (id.).¹⁴ According to the June 2021 IEP, the CSE "determined that [the student] could benefit from additional support in [s]ocial [s]tudies and the addition of access to a calculator" (id.).

As reflected in the student's final progress report for her annual goals for the 2020-21 school year, the student had achieved all of her annual goals (see Parent Ex. I at pp. 1-2). The student's report card for the 2020-21 school year reflected the difficulties of the year-long remote instruction (see Parent Ex. H). The student's grades revealed averages that ranged from a low of "55" in both "Living Environment" and "Social Studies" for all four marking periods, a "55" in "General Music" for the third and fourth marking periods, and a "55" in physical education for the third marking period, to a high average of "94" in "Art" for the second marking period (id.). In "PLANT III," the student received an "F" for the first three marking periods and a "P" for the fourth marking period (id.). Overall, the student's grade point averages ranged from a "59.86" in the fourth marking period to a "74.43" in the first marking period (id.). In addition, the student's report card reflected numerous absences, which, for example, ranged from "1" in "Reading" to "38" in "Math," "30" in "Living Environment," "28" in "Social Studies," and "26" in "PLANT III" (id.).

At the impartial hearing, the former director testified that the district did not receive a copy of the psychoeducational IEE report "until the next school year had started in the fall" (i.e., fall 2021) (Tr. pp. 152, 352, 455). A review of the psychoeducational IEE report reflects that it was dated September 9, 2021 (September 2021 IEE report) (see Parent Ex. K at p. 24). The former director also noted that the district may not have received the September 2021 IEE report prior to the student's withdrawal from the district on or about October 25, 2021 (see Tr. pp. 352-53). Subsequent testimony by the director who took over after the former director left indicated that the district received the September 2021 IEE report after the student's withdrawal from the district but identified the date as October 21, 2021 (see Tr. p. 1166).

In a "Student Withdrawal Form," dated October 25, 2021, the parent informed the district that the student had last attended school in June 2021 and that her withdrawal date was September

¹³ At the impartial hearing, the former director explained that, for reasons not attributable to the district, the requested IEE had not yet been completed due to delays; however, she noted that the CSE "did not want to delay the annual review" and it had been held "as far out as [the CSE] could" in order to possibly have the completed IEE report (Tr. pp. 151-52). The former director also testified, however, that the June 2021 CSE had the results of the student's April 2021 psychoeducational evaluation and the CSE proceeded with the annual review (see Tr. p. 152). She explained that the CSE had "compliance due dates to meet," and generally, a "district reevaluation suffice[d] to make decisions" regarding programming and services (Tr. p. 152). The former director testified that if the CSE needed more information, the CSE could "determine that at the meeting" (Tr. pp. 152-53). She also testified that the April 2021 psychoeducational evaluation was "sufficient from an evaluation standpoint" (Tr. p. 153).

¹⁴ The former director testified that, despite soliciting the parent's input at the CSE meeting, the parent declined to provide any input at the June 2021 CSE meeting regarding the student's programming (see Tr. p. 154).

2021 (Dist. Ex. 34).¹⁵ As to the reason for her withdrawal, the parent indicated that the student was a "gifted child," who was "bored at school and did not feel challenged" (id.). The parent further noted that a 10-day notice was "forthcoming" (id.).

By letter dated October 26, 2021, the parents notified the district of their intentions to unilaterally place the student at Landmark for the 2021-22 school year and to seek reimbursement for the costs of the student's tuition, "pro-rated to start [10] days from [the date of the letter], and all related expenses of the placement" (Parent Ex. L). In the letter, the parents indicated that they were rejecting the student's IEP for the 2021-22 school year because it was not appropriate to meet the student's needs and failed to offer her a free appropriate public education (FAPE) (id.). The parents noted that Landmark provided "specialized instruction in small classes and individually tailored services, including counseling and specialized instruction in reading, writing, math, and executive functions," which would allow the student to "eventually gain independence in her academic tasks and social-emotional resilience" (id.).

On April 1, 2022, a CSE convened to conduct the student's annual review and developed an IEP for the student for the 2022-23 school year (10th grade) (see Parent Ex. N at p. 1). Finding that the student remained eligible to receive special education as a student with a learning disability, the April 2022 CSE recommended a general education placement with ICT services for instruction in all content areas: ELA (five 40-minute sessions per week, i.e., daily), social studies (five 40-minute sessions per week, i.e., daily), mathematics (one 40-minute session weekly), and science (one 40-minute session daily) (id. at pp. 1, 7-8).¹⁶ In addition to ICT services, the April 2022 CSE recommended direct, individual reading instruction (one 40-minute session every other day); resource room in a group (one 40-minute session every other day); supplementary aids and services, program modifications, and accommodations, which included the use of a graphic organizer, preferential seating, access to a calculator, and access to a word processor; and testing accommodations (extended time, location with minimal distractions, and prompts to recheck responses) (id. at pp. 8-9).¹⁷

According to the April 2022 IEP, the student was absent from school during September 2021 and had been "withdrawn from the" district on October 25, 2021 (Parent Ex. N at p. 1). The April 2022 IEP indicated the student attended Landmark, a boarding school, but that the parent "confirmed" the student's return to the district beginning September 2022 (id.). To determine the student's needs, the April 2022 IEP indicated the CSE reviewed Landmark's October 2021 and January 2022 progress reports, an April 2021 psychoeducational evaluation, and the March 2018

¹⁵ At the impartial hearing, the parent testified that the student began attending Landmark on August 25, 2021 (see Tr. p. 1385).

¹⁶ The former director testified that the frequency for ICT services in mathematics—as noted on the April 2022 IEP—was an "entry error," and instead, the April 2022 IEP should have reflected ICT services in mathematics on a daily basis as either "five times a week [for] 40 [minutes] or one time a day" (Tr. pp. 238-39, 431-32).

¹⁷ In the April 2022 IEP, the CSE described the delivery of the resource room program as occurring in a group of five students "to address executive functioning/organizational skills a[n]d to generalize reading skills learned in isolation" (Parent Ex. N at p. 8).

dyslexia evaluation (id. at p. 3; see Dist. Exs. 18 at p. 1; 19 at p. 1; 29 at p. 1; 30 at p. 1).¹⁸ According to the April 2022 IEP, Landmark's "liaison" attended the CSE meeting and offered "an overview of [the student's] current academic program and progress" (id. at p. 1). However, as reflected in the April 2022 IEP, neither Landmark's liaison nor the parent offered any comments or input with respect to the student's programming and services at the meeting, but instead, "deferred to the Committee" (id.).

By letter dated August 4, 2022, the parents notified the district of their intentions to unilaterally place the student at Landmark for the 2022-23 school year and to seek reimbursement for the costs of the student's tuition for the 2022-23 school year (see Parent Ex. Q). In the letter, the parents indicated that they were rejecting the student's IEP for the 2022-23 school year because it was not appropriate to meet the student's needs and failed to offer her a FAPE (id.). The parents noted that Landmark provided "specialized instruction in small classes and individually tailored services, including counseling and specialized instruction in reading, writing, math, and executive functions," which would allow the student to "eventually gain independence in her academic tasks and social-emotional resilience" (id.).

On August 23, 2022, the parent executed a "Landmark School, Inc. Enrollment Agreement" for the student's attendance at Landmark for the 2022-23 school year in its "Academic Residential" program, which was scheduled to begin in August 2022 and conclude in June 2023 (Parent Ex. Z at pp. 1, 9). It appears from the enrollment agreement that the parent submitted the executed enrollment contract to Landmark on August 25, 2022 (id. at p. 1).¹⁹

On January 18, 2023, a CSE convened to conduct the student's annual review and developed an IEP for the 2023-24 school year (11th grade) (see Parent Ex. U at p. 1). Finding that the student remained eligible to receive special education as a student with a learning disability, the January 2023 CSE recommended a general education placement with ICT services for instruction in all content areas: ELA (five 40-minute sessions per week, i.e., daily), social studies (five 40-minute sessions per week, i.e., daily), mathematics (five 40-minute sessions per week, i.e., daily), science (five 40-minute session per week, i.e., daily), and science lab (one 40-minute session on alternate days) (id. at pp. 1, 8). In addition to ICT services, the January 2023 CSE recommended direct, individual reading instruction (one 40-minute session every other day); resource room in a group (one 40-minute session every other day); supplementary aids and services, program modifications, and accommodations, which included the use of a graphic organizer, preferential seating, access to a calculator, and access to a word processor; and testing

¹⁸ The evidence in the hearing record reflects that the district did not receive copies of the student's Landmark progress reports until March 31, 2022, the day before the April 2022 CSE meeting (see Dist. Ex. 30 at p. 5).

¹⁹ After providing the district with a 10-day notice of unilateral placement for the 2023-24 school year, the parents prepared a due process complaint notice, dated August 31, 2022, alleging that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (see Parent Ex. R at pp. 1, 6-7, 9). However, as described below, the parents subsequently amended the due process complaint notice to include allegations concerning the 2023-24 school year (compare Parent Ex. W, with Parent Ex. R).

accommodations (extended time, location with minimal distractions, and prompts to recheck responses) (id. at pp. 8-10).²⁰

As noted in the January 2023 IEP, the student had remained absent from the district since September 2021 and had been "withdrawn from the" district on October 25, 2021 to attend Landmark (see Parent Ex. U at p. 1). The January 2023 IEP indicated that the CSE asked the parent if the student would be reenrolled in the district, and in response, the parent "stated that [the student] was never withdrawn from the district" (id.). Along with the previously available October 2021 and January 2022 Landmark progress reports, April 2021 psychoeducational evaluation, and the March 2018 dyslexia evaluation, the January 2023 CSE indicated, in the IEP, that the parent provided the CSE with Landmark's first quarter progress report the day before the CSE meeting (id. at pp. 1, 3-4).

By letter dated April 3, 2023, the parents notified the district of their intentions to unilaterally place the student at Landmark for the 2023-24 school year and to seek reimbursement for the costs of the student's tuition for the 2023-24 school year (see Parent Ex. V). In the letter, the parents indicated that they were rejecting the student's IEP for the 2023-24 school year because it was not appropriate to meet the student's needs and failed to offer her a FAPE (id.). More specifically, the parents indicated that the IEP "would not directly address at least one of her documented disabilities and would inadequately support another" (id.). The parents noted that Landmark provided "specialized instruction in small classes and individually tailored services, including counseling and specialized instruction in reading, writing, math, and executive functions," which would allow the student to "eventually gain independence in her academic tasks and social-emotional resilience" (id.).

On April 15, 2023, the parent executed a "Perpetual Enrollment Agreement" with Landmark for the student's attendance at Landmark for the 2023-24 school year, which was scheduled to begin in August 2023 and conclude in June 2024 (Parent Ex. Z at pp. 1, 11). The perpetual agreement bound the parties contingently upon the student's "successful completion of the 2022-2023 academic year," but did not "guarantee future enrollment" at Landmark (id. at p. 1). According to the agreement, it "extend[ed] until the graduation of the student" from the "High School Program" (id.).

A. Due Process Complaint Notice

By due process complaint notice, dated April 25, 2023, the parents alleged that the district failed to offer the student a FAPE for the 2020-21, 2021-22, 2022-23, and 2023-24 school years (see Parent Ex. W at pp. 1, 8-9, 10-11).²¹ With respect to the 2021-22 school year, the parents asserted the student's June 2021 IEP failed to include recommendations for counseling services, specialized instruction for mathematics and writing, sufficient reading instruction, and appeared

²⁰ In the January 2023 IEP, the CSE described the delivery of the resource room program as occurring in a group of five students "to address executive functioning/organizational skills a[n]d to generalize reading skills learned in isolation" (Parent Ex. U at p. 8).

²¹ Although identified in the parents' exhibit list as an "Amended Request for a Due Process Hearing," the document, itself, does not reflect that it is an amended due process complaint notice (Parent Ex. W at p. 1).

to have been "written in the absence of such expert recommendations" from the September 2021 IEE report (id. at pp. 4-5, 8).²² With regard to the 2022-23 school year, the parents asserted that the April 2022 IEP, and January 2023 IEP failed to include annual goals in the areas of spelling and decoding, sufficient reading instruction, specialized instruction in mathematics and writing, and failed to recommend counseling services (id. at pp. 6, 8). As for the 2023-24 school year, the parents alleged that the January 2023 IEP failed to include sufficient reading instruction, specialized instruction in mathematics and writing, and was essentially a copy of the April 2022 IEP (id. at pp. 7-8). More generally, the parents alleged that the district violated its child-find obligation by failing to discover and identify the student's learning disabilities and social/emotional disorder (id. at p. 8). In addition, the parents alleged that the district failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) related to the student's "school resistance" (id. at p. 8).

Next, the parents contended that the unilateral placement at Landmark for the 2021-22, 2022-23, and 2023-24 school years was appropriate, and equitable considerations weighed in favor of their requested relief (see Dist. Ex. 72 at pp. 9-10).

As relief, the parents sought an order directing the district to reimburse them for the costs of the student's tuition and "all other expenses, including but not limited to student assistive technology, activity fees, books, computers, tuition insurance, and finance charges" at Landmark for the 2021-22, 2022-23, and 2023-24 school years (Dist. Ex. 72 at p. 10). The parents also sought an order directing the district to reimburse them for the costs of the student's attendance at two summer camps, as well as the costs of privately-obtained evaluations and counseling services (id.).

B. Impartial Hearing Officer Decision

On September 12, 2023, the parties proceeded to an impartial hearing, which concluded on April 10, 2024, after 15 total days of proceedings (see Tr. pp. 1-2117). In a decision dated July 25, 2024, the IHO found that the district offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years; Landmark was not an appropriate unilateral placement for the student; and equitable considerations did not weigh in favor of the parents' requested relief (see IHO Decision at pp. 9-21). As a result, the IHO dismissed the parents' due process complaint notice (id. at p. 22).

In finding that the district offered the student a FAPE for the 2021-22 school year, the IHO initially described the student's educational history during several school years leading up to the 2021-22 school year (see IHO Decision at pp. 7-8, 10). For example, the IHO noted that, in 2017, the district had identified the student's deficits in "spelling and reading," and after a privately-obtained evaluation of the student in March 2018 diagnosed the student as having "dyslexia," a CSE convened in June 2018 for an initial eligibility determination meeting and found the student eligible to receive special education as a student with a learning disability (id. at p. 7, citing Dist.

²² Other than this statement, the parents' due process complaint notice does not include any specific allegation that the district failed to fully evaluate the student or failed to appropriately consider the results of the September 2021 IEE report, which, based on the evidence in the hearing record, the district did not receive until sometime in October 2021 after the student had already been withdrawn from the district public school (see generally Parent Ex. W).

Exs. 1-2; 17). The IHO indicated that, at that time, the June 2018 CSE recommended integrated co-teaching (ICT) services for instruction in English language arts (ELA) for the 2018-19 school year (see IHO Decision at p. 7, citing Dist. Ex. 2). With regard to the 2019-20 school year, the IHO noted that a March 2019 CSE met and recommended "direct individual reading instruction" for the student, as well as ICT services for instruction in ELA (IHO Decision at p. 7, citing Dist. Ex. 4). However, during the 2020-21 school year due to the former Governor of the State of New York's executive orders and the COVID-19 pandemic, the district had offered parents the option of "remote instruction or full-day in person instruction," and in this matter, the parents opted for the fully remote instruction and the "student was placed in small cohorts with their peers based upon their class schedule" (IHO Decision at p. 7, citing Tr. pp. 1450-51, 1120). According to the IHO, the parents also requested that the student be "placed in the same cohort" as her sister for "algebra and living environment which were not the courses th[is s]tudent was scheduled to take" (IHO Decision at p. 8, citing Tr. pp. 1126-27). In addition, the IHO noted that the student "missed approximately 63 [percent] of her classes with 38 absences in Math 8 and 30 in Living Environment" (IHO Decision at p. 8, citing Parent Ex. J; Dist. Ex. 24).

Next, the IHO indicated that a CSE convened in February 2021 to "address progress concerns" of the student (IHO Decision at p. 8, citing Dist. Ex. 8). As noted by the IHO, the February 2021 CSE "implemented a procedure" that allowed the student to "attend the resource room and 1:1 reading instruction in person" by minimizing concerns related to exposure to COVID-19 (IHO Decision at p. 8, citing Tr. pp. 942-43). The IHO then noted, that in April 2021, the district conducted a "psychoeducational evaluation" of the student, which included recommendations for the "use of a calculator to overcome mathematical fluency difficulties, extra time on tests, multi-step directions, pre-writing techniques, and no penalization for spelling errors" (IHO Decision at p. 8, citing Dist. Ex. 19). Thereafter, in June 2021, a CSE met and developed an IEP, which the IHO found had included recommendations for the student to receive ICT services for instruction in ELA and social studies, resource room, direct reading instruction, use of a graphic organizer, preferential seating, access to a calculator and word processor, and a graphic organizer (see IHO Decision at p. 8, citing Parent Ex. J).

Next, the IHO indicated that the student was "diagnosed with dyscalculia" due to an IEE, which was provided to the district "on or about October 21, 2021" (IHO Decision at p. 8, citing Tr. p. 1166; Dist. Ex. 18). Additionally, the IHO indicated that the parents withdrew the student from the district, and the student began attending Landmark (see IHO Decision at p. 8, citing Parent Exs. HH; Y). The IHO found that the parents submitted a "withdrawal form" to the district "after the student had missed [nine] days of school" (IHO Decision at p. 8, citing Tr. p. 1136; Dist. Ex. 34). Although noting that the student had not returned to the district since being withdrawn, the IHO indicated that CSEs convened in April 2022 and January 2023 to develop IEPs for the student for, respectively, the 2022-23 and 2023-24 school years (see IHO Decision at p. 9, citing Tr. p. 160; Parent Exs. Y-Z; CC).

Turning to the question of whether the district offered the student a FAPE for the 2021-22 school year, the IHO initially reviewed evidence regarding the student's program and performance during the 2020-21 school year (see IHO Decision at p. 10).²³ The IHO indicated that the student,

²³ The IHO previously noted that although the parents alleged in the due process complaint notice that the district

who had remained on remote instruction at the parents' election during the 2020-21 school year, "did not excel within th[is] framework" (*id.*). According to the IHO, a "litany of absences and a lack of engagement threaded" the 2020-21 school year for the student, which the district attempted to address by engaging with the parents and by providing the student with a "1:1 tutor" to help her "with keeping up with the workload" (*id.*). In addition, the IHO further noted that a CSE convened to add services to the student's program, and at that time, progress was reported regarding the student's annual goals (*id.*).

The IHO opined that it was "important" to consider the context of the 2020-21 school year because the district "must view the [s]tudent holistically" and take "incremental steps to improve the IEP," "gaug[ing] progress or lack thereof" in order to determine whether to "'stay the course' or alternatively reconsider the approach based on the new data" (IHO Decision at pp. 10-11). More specifically, the IHO indicated that the "IEP must be calculated to confer educational benefit based on the information known to the CSE at the time," and at the time of the June 2021 CSE meeting, the student's "IEE was not yet completed and would not be received until October 26, 2021" (*id.* at p. 11). The IHO found, therefore, that "for the purposes of analyzing the June 24, 2021 meeting it c[ould] not be considered" (*id.*).

In developing the June 2021 IEP, the IHO found that the district relied on the April 2021 psychoeducational evaluation conducted by the district, which included recommendations for the "use of a calculator to overcome mathematical fluency difficulties, extra time on tests, multi-step directions, pre-writing techniques, and no penalization for spelling errors" (*see* IHO Decision at p. 11). The IHO noted that the June 2021 CSE had "no concerns regarding [the student's] access to [the] math curriculum," as the CSE "believ[ed] her failure to complete assignments while in a remote setting was the issue" and attributed her "38 absences in math" as the "root case of the issue which should be rectified with in-person instruction" (*id.*). With respect to counseling, the IHO found that, based on testimonial evidence, the CSE did not recommend it because it "would not address pandemic related isolation" and overall, there was a "lack of evidence to support counseling more generally" (*id.*). Next, the IHO found that, based on testimony, "resource room provided specialized writing instruction" and ensured that the student's annual goals "continued to address writing" (*id.*). In addition, the IHO noted that although the student demonstrated the ability to "answer inferential and evaluative questions verbally," this continued to remain an area of "weakness" in her writing (*id.*). The IHO further noted that "[t]his [wa]s identified as an area where more progress was needed including the ability to express herself in writing as well as she could verbally" (*id.*). The IHO also found that, based on testimony, the June 2021 CSE "continued the resource room at the same level" in order to address the student's "executive functioning needs" (*id.*).

Next, the IHO addressed the parents' concern that the "testimony regarding resource room f[ell] under retrospective rehabilitation and should not be considered," pursuant to the Second Circuit's holding in R.E. v. New York City Department of Education, 694 F.3d 167, 186 (2d Cir. 2012) (IHO Decision at p. 12). After briefly explaining the premise of R.E. and the improper use

failed to offer the student a FAPE for the 2020-21 school year, the parents had not requested any relief for the alleged violation and had not argued the allegation in their closing brief (*see* IHO Decision at p. 7 n.3). As such, the IHO indicated that the 2020-21 school year "was only considered for background purposes" (*id.*).

of retrospective evidence, the IHO determined that, in this instance, resource room had been included as a recommendation in the student's June 2021 IEP, and "therefore testimony to explain the nature of the program, [wa]s of course admissible and necessary in order to determine whether or not the IEP was appropriately crafted" (id.). The IHO indicated that, within the June 2021 IEP, resource room was described "'to address executive functioning/organizational skills and to generalize reading skills learned in isolation'" (id.). The IHO was not persuaded by the parents' argument that "writing and math c[ould] not be discussed within the context of [r]esource [r]oom and their inclusion c[ould] not be considered" because, according to the IHO, resource room was "listed within the IEP," and as further explained, "services generally tend[ed] to be multidisciplinary and sometimes reading skills affect[ed] writing skills and both of those skills w[ould] affect math instruction and so forth" (id.). As a result, the IHO concluded that, "to the extent that math and writing skills may [have] be[en] touched in the resource room [wa]s of course relevant" (id.).

Moreover, the IHO indicated that, with regard to the student's performance in mathematics, the June 2021 CSE found that her "issues . . . were largely based on the issues of absences and not the ability to access the curriculum" (IHO Decision at p. 12). Thus, the IHO found that the district was not required to maximize the student's potential or "otherwise maximiz[e] the student's services to yield the best result," and instead, needed to only ensure that the student's needs were met and afforded her access to the curriculum to make progress (id.). The IHO also noted that it was not "unreasonable" for the June 2021 CSE to conclude that the student's "absences played a role in perceived deficits," but the "inclusion of more intensive reading, writing, and math instruction was not yet warranted" (id. at pp. 12-13).

The IHO then turned to examine the parents' claims concerning the 2022-23 school year, which included the alleged failure to include annual goals for spelling and decoding and which allegedly failed to include "specialized math and writing instruction and counseling" in the April 2022 IEP (IHO Decision at p. 13). Contrary to the parents' contention, the IHO found that the April 2022 IEP included "spelling goals" that addressed the student's need to "apply conventional spelling rules appropriately" and then noted that the district "intended to address spelling weaknesses through 1:1 reading instruction, resource room support, and [the ICT services for] ELA" (id.). In addition, the IHO found that the student's spelling was addressed in her "specially designed reading plan which was to address orthographics which le[d] to improved spelling" (id.). The IHO also found that the April 2022 IEP included an "accommodation related to spell check . . . through the use of a word processor" (id.). The IHO also pointed to the student's scores obtained from the district's April 2021 psychoeducational evaluation, which yielded scores that all fell within the average range in the areas of pseudoword decoding, a basic reading composite (included decoding), a decoding composite, a phonological processing composite, and a dyslexia index composite (id., citing Dist. Ex. 19). In addition, the IHO pointed to the parents' privately obtained evaluation of the student, which yielded a "Basic Reading Skills composite" score of 85, "which in part measure[d] nonsense word decoding" (IHO Decision at p. 13, citing Dist. Ex. 18). The IHO found that, while the parents' evaluator had "identifie[d] this score as below average, she testified that a score of 85[to]115 [wa]s within normal limits" (IHO Decision at p. 13, citing Tr. pp. 1897-98).

With respect to mathematics, the IHO indicated that the April 2022 IEP provided the student with supports, such as access to a calculator and ICT services (see IHO Decision at p. 13).

The IHO further indicated that the parents had not requested annual goals for mathematics, and noted that the parents' evaluator had failed to consider the student's scores obtained from the district's April 2021 psychoeducational evaluation (*id.* at pp. 13-14). For example, the IHO indicated that the student's scores fell within the average range in the areas of numerical operations, math problem solving, math fluency (addition), and math fluency (multiplication), for a "total mathematical composite score of 93" (*id.* at p. 14, citing Dist. Ex. 19). Based on testimonial evidence, the IHO found it "intuitive" that, if a student was assessed in mathematics two months apart and obtained two different scores, the "'true measure [wa]s more likely the higher [score], because you c[ould not] accidentally get those questions right'" and instead, it was easier to get questions wrong "'by lack of motivation'" (IHO Decision at p. 14, citing Tr. p. 632). The IHO also noted that the parents' evaluator had not discussed the student's "classroom performance in math," she had not "confer[red] with any of the [s]tudent's math teachers," and she had "failed to explain a double-digit drop in math scores over the course of two months" (IHO Decision at p. 14, citing Tr. pp. 731, 742, 1914). According to the IHO, when "such a discrepancy exists," a CSE should examine "both results and discuss in detail what these results mean and not jump to any conclusion as to their meaning" (IHO Decision at p. 14). Here, the IHO indicated that such "discussion was in part hampered by the fact that the [Landmark] staff . . . declined to provide recommendations on programs and services" (*id.*, citing Tr. pp. 241-42).

Next, the IHO addressed the parents' claim regarding the failure to recommend counseling in the April 2022 IEP for the 2022-23 school year (*see* IHO Decision at p. 14). The IHO found that the CSE "was not presented with any information which warranted counseling services," and the parents did not make any "requests" regarding social/emotional services or "specific interventions regarding counseling" for the student (*id.*). And finally, the IHO determined that the CSE properly considered the "reading specialist's input and progress monitoring data" to recommend "1:1 reading instruction every other day," which was appropriate to meet the student's needs (*id.*). As a result, the IHO found that the district offered the student a FAPE for the 2022-23 school year (*id.*).

Turning to the 2023-24 school year, the IHO initially noted that the January 2023 CSE did not receive progress reports from Landmark "until the day before" the meeting (IHO Decision at pp. 14-15). According to those progress reports, however, the IHO indicated that the student's "reading fluency was noted to be at the same rate as reported in the previous academic year" (*id.* at p. 15, citing Dist. Exs. 29; 32). The progress reports also included information demonstrating that the student had a "consistent need for teacher check-ins and prompts, directions, support with executive functioning, and specially designed reading instruction" (IHO Decision at p. 15, citing Dist. Ex. 32). The IHO indicated that, based on the progress reports, the January 2023 CSE "identified the [s]tudent as having academic management needs which could be supported through resource room" and ICT services (i.e., special education teacher) "across all content areas" (IHO Decision at p. 15, citing Tr. pp. 1171, 1173). In addition, the IHO found that the CSE continued to recommend resource room "as it provided small group space with a special education teacher" to support the student's executive functioning needs (IHO Decision at p. 15, citing Tr. p. 1179). The IHO further found that, based on the progress reports, the student needed to "continue to work on setting goals, advocacy, punctuality, organization, and growth mindset" (IHO Decision at p. 15, citing Dist. Ex. 32). In contrast, the IHO noted that the progress reports did not reflect a "need

for decoding, encoding, or vocabulary phonological awareness," and therefore, the CSE did not develop annual goals related to these areas (IHO Decision at p. 15, citing Tr. pp. 995-96).

With regard to the parents' allegation concerning writing instruction, the IHO found that the January 2023 IEP "provided specialized writing support through not only her [annual] goal to increase written composition, but through [the ICT services for] ELA, use of a graphic organizer, and use of a word processor" (IHO Decision at p. 15, citing Dist. Ex. 16). In addition, and based on information from Landmark, the IHO indicated that the CSE "believed the [s]tudent could write a paragraph," and therefore, the "natural progression of [annual] goals would be to compose at least three paragraphs" (IHO Decision at p. 15, citing Tr. p. 998). According to the evidence, the IHO found that mathematics was "addressed via the use of a calculator" and ICT services for mathematics, and the parents had "declined to provide any insight or input into geometry, history, or physical science as areas of need" for the student (IHO Decision at p. 15, citing Tr. pp. 998, 1183). While noting that the January 2023 CSE received "limited information" from the parents and Landmark, the IHO concluded that the January 2023 IEP "provided sufficient support" to ensure that the student continued to make progress during the 2023-24 school year (IHO Decision at pp. 15-16).

Thus, based on the foregoing, the IHO concluded that the district offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years, as the student's IEPs were "reasonably crafted to confer[] educational benefit" (IHO Decision at p. 16).

Having concluded that the district offered the student a FAPE for the school years at issue, the IHO examined the parents' unilateral placement of the student at Landmark (see IHO Decision at pp. 16-19). After reciting the applicable legal standards, the IHO determined that the parents failed to establish their burden of proof because the hearing record lacked evidence that the student required a "residential placement," which the IHO characterized as "undeniably one of the most restrictive forms of placement" (id. at pp. 16-18). For example, the IHO indicated that the hearing record lacked evidence that the student "would regress or fail to progress in a traditional day-program," and moreover, the student had "shown progress during their years at [the district public schools], and their deficits, on the surface, d[id] not warrant consideration of a residential program" (id. at pp. 18-19). Moreover, the IHO found that a residential placement was "never indicated by any evaluation by the [d]istrict or [p]arental evaluations" (id. at p. 19). Overall, based on the evidence, the IHO determined that a residential placement at Landmark was not required for the student to "access education" and therefore, Landmark was not an appropriate unilateral placement (id.).

Next, the IHO addressed equitable considerations (see IHO Decision at pp. 19-21). On this point, the IHO found that, based on the documentary and testimonial evidence, the student's "enrollment in [Landmark] was well underway before any relevant CSE meeting" (id. at p. 20). While noting that parents were "free to make alternative plans," the IHO found that "several factors raise[d] concerns," including that the parents "withheld" information from the June 2021 CSE about the student's enrollment at Landmark prior to the meeting, the parents "repeatedly prohibited access to information" about Landmark, and "prevent[ed] the placement representative from providing input on the student's program or services" (id. at pp. 20-21, citing Tr. pp. 241-42; Dist. Ex. 14). According to the IHO, "[t]hese actions call[ed] into question the veracity of the parent's

testimony and whether they entered the CSE meeting with an open mind, willing to consider alternatives" (IHO Decision at p. 21).

In addition, the IHO pointed to the testimony of the student's mother, who appeared to "evade the question[s] being asked" and who "[c]raft[ed] nuanced answers to particular questions," which demonstrated an unwillingness to be "forthcoming with her answers" especially when asked about the costs of the student's program (IHO Decision at p. 21). Therefore, in the IHO's opinion, the parent "demonstrated a level of evasiveness that further questioned whether the parent honestly considered the district's options and approached the process with an open mind" (*id.*). As determined by the IHO, the parent was "singularly focused on sending their child to this residential placement," and "while understandable," the IHO concluded that it did not "necessitate the costs to be covered at public expense" (*id.*).

In light of the evidence and the foregoing conclusions, the IHO dismissed the parents' due process complaint notice, as the parents "failed to allege a cause of action upon which relief c[ould] be granted" (IHO Decision at p. 22).

IV. Appeal for State-Level Review

The parents appeal, arguing initially that the IHO erred by dismissing the parents' due process complaint notice for the failure to state a claim because neither party made a motion to dismiss.²⁴ Next, the parents contend that the IHO erred by failing to apply the legal standard for IEEs when analyzing whether the district offered the student a FAPE. Specifically, the parents argue that the district failed to consider the September 2021 IEE when developing the student's IEPs. Next, the parents assert that the IHO erred by failing to rely on the appropriate legal standard, and more specifically assert that the IHO failed to apply Andrew F. v. Douglas County School District RE-1, 137 S.Ct. 988 (2017) in reaching his conclusions of law. Additionally, the parents argue that the IHO erred by finding that the district offered the student a FAPE because the IHO allegedly made numerous factual errors.

With respect to the unilateral placement, the parents contend that the IHO erred by misapplying least restrictive environment (LRE) principles in finding that Landmark was not appropriate. The parents also contend that the IHO erred by finding that they predetermined the student's unilateral placement at Landmark. As relief, the parents seek to overturn the IHO's findings and to order the district to reimburse them for the costs of the student's tuition at Landmark for the 2021-22, 2022-23, and 2023-24 school years.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety. In addition, the district contends that the parents failed to comply

²⁴ To the extent that the IHO may have used language more typically associated with a motion to dismiss—that is, "the [p]arent has failed to allege a cause of action upon which relief can be granted"—in one of the ordering clauses in the decision, there is no reference whatsoever to a motion to dismiss, either within the decision itself or within the entire hearing record, indicating that the IHO was considering a motion to dismiss or granting a motion to dismiss (compare IHO Decision at p. 22, with IHO Decision at pp. 1-21, and Tr. pp. 1-2117, and Parent Exs. A-Z; BB-CC; HH-KK; MM; OO-TT; VV, and Dist. Exs. 1-51; 53-74). Consequently, this argument will not be further addressed in the decision.

with practice regulations and improperly used the memorandum of law in lieu of or in place of a request for review. Next, the district asserts that, while the parents raise challenges to the IHO's findings with regard to whether the district offered the student a FAPE and whether Landmark was an appropriate unilateral placement, the parents do not challenge the IHO's finding with respect to equitable considerations. As a result, the district contends that the request for review must be dismissed on this basis.

In a reply, the parents responded to the arguments in the district's answer with respect to compliance with practice regulations.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F., 580 U.S. at 399). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; *see* Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; *see* Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; *see* T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; *see* Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; *see* Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (*see* 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (*see* 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (*see* 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).²⁵

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy

²⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed because it fails to comply with practice regulations, noting, in particular, that the parents are attempting to use the memorandum of law submitted therewith as a pleading. The district asserts that any arguments raised solely in the memorandum of law are not properly raised and thus, cannot be addressed. In addition, the district contends that the parents improperly seek to incorporate the statement of facts from the memorandum of law. The district further contends that the request for review fails to include citations to the evidence in the hearing record, and the memorandum of law addresses factual issues beyond the scope of the due process complaint notice.

The parents deny the district's contentions. More specifically, the parents assert that the district fails to point to a single issue raised solely in the memorandum of law that was not already raised in the request for review. In addition, the parents assert that any amplification of arguments in the memorandum of law mirror those set forth in the district's answer. As a result, the parents contend that the incorporation of the memorandum of law into the request for review does not circumvent page limitations.

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8 [c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8 [c][4]). Relatedly, State regulations preclude the filing of any other pleadings, with the exception of the pleadings described therein, and it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Upon review, the parents' request for review generally complies with the practice regulations, as it includes sufficient citations to the hearing record (see generally Req. for Rev.). For example, the parents cite to State regulations, transcript pages, and documentary evidence in support of their contentions challenging the IHO's findings (see, e.g., Req. for Rev. at pp. 3-5). To the extent that the parents' memorandum of law raises issues that are not set forth in the request for review, those arguments included solely within the memorandum of law have not been properly raised. However, issues relating to the district's provision of a FAPE that the parents identify in their request for review (i.e., the CSE's alleged failure to consider the results of the September 2021 IEE, the lack of specialized writing instruction) are addressed below. With that said, the undersigned will not sift through the due process complaint notice, the hearing record, and the IHO's decision for the purpose of identifying further issues for appeal on the parents' behalf that the parents have not taken the time to specifically identify in the request for review.

In light of the parents' limited request for review, several of the IHO's determinations are unchallenged. These include the IHO's findings that the hearing record lacked sufficient evidence that the student required counseling services or specialized mathematics instruction for the 2021-22 school year; that the April 2022 IEP addressed the student's spelling needs through the annual goals, that the IEP included sufficient reading instruction to meet the student's needs and appropriately addressed the student's needs in mathematics, and that the hearing record lacked sufficient evidence that the student required counseling for the 2022-23 school year; and finally, that the January 2023 IEP appropriately addressed the student's needs in mathematics and the hearing record lacked evidence that the student required annual goals for decoding, encoding, vocabulary, or phonological awareness (see IHO Decision at pp. 9-16). Therefore, these determinations have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In addition, on appeal, the parents have not pursued several issues raised in the due process complaint notice which the IHO did not specifically address, such as the parents' allegations that the district violated its child find obligations, the district failed to conduct an FBA or develop a BIP for the student, and the June 2021 IEP and January 2023 IEP failed to include sufficient reading instruction for the student (compare Parent Ex. W at pp. 4-5, 7-9, with IHO Decision at pp. 9-16). Accordingly, these claims are deemed abandoned and will not be further addressed (see 8 NYCRR 279.8 [c][4]).

2. Legal Standard

The parents assert that the IHO failed to apply the Andrew F. standard to analyze whether the district offered the student a FAPE for the school years at issue. Specifically, the parents argue that the IHO should have considered whether the student's IEPs were "'appropriately ambitious in light of [the student's] unique circumstances and needs,'" and therefore, the IHO's findings should be reversed.

In response, the district asserts that, although the IHO's decision may not have referenced Andrew F., the district complied with the standard set forth therein with respect to the special education programming recommended for the school years at issue. The district also asserts that Rowley remains good law, and the Newington case cited by the IHO stands for the proposition that an "'IEP must provide the opportunity for more than only a 'trivial advancement[.]'"

A review of the IHO's decision reveals that, consistent with the parents' statements, the IHO did not cite to or reference Andrew F. within the decision (see generally IHO Decision). At the same time, Rowley was discussed at length in Andrew F. and every aspect of Rowley was continued by the Supreme Court in Andrew F. but for an explanation of why the 10th Circuit's particular analysis when applying the law to the facts fell short of the Supreme Court's vision of the standard in Rowley, and thus Rowley remains the foundational case in this area of law—a point the parents concede when they admit in the request for review that Rowley remains controlling law. Furthermore, none of the statements of the IHO in citing to Rowley appear to be in contradiction with Andrew F. Consequently, I am not convinced that the IHO erred in his determinations merely because Rowley was relied upon and Andrew F. went uncited. However, even if the IHO did apply an incorrect legal standard, I have fully reviewed the IHO's factual findings and the evidence in the hearing record and apply the most recent legal standard set forth by the Supreme Court in Andrew F. in my own deliberations and, as more fully described below, find no reason to reverse the decision.

B. CSE Process

1. Consideration of Evaluative Information

The parents allege that the IHO erred by failing to apply relevant State regulations with regard to the district's failure to consider the September 2021 IEE report when analyzing whether the district offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years. More specifically, the parents point to State regulation 8 NYCRR 200.5(g)(vi)(a), which, in relevant part, mandates that if a parent obtains an IEE at public expense, the results of the evaluation "must be considered by the school district, . . . , in any decisions made with respect to the provision of a

[FAPE] for the student." The parents contend that not only does the hearing record lack evidence demonstrating that the district considered the IEE report, but also the hearing record lacks evidence demonstrating that the district invited the IEE evaluator to attend any CSE meeting and the district failed to reconvene a CSE meeting to consider the IEE report. In addition, the parents contend that because the district approved and paid for the IEE, the CSE "naturally knew that testing dates for the IEE had concluded" prior to the June 2021 CSE meeting. Finally, the parents assert that the mandate in the State regulation "highlights the rule's role as a substantive requirement for the proper creation of an IEP, not a technical procedural step whose absence can only be considered a denial of [a] FAPE in the context of multiple such violations" and seeks a finding that the district failed to offer the student a FAPE on this basis.

In response, the district initially argues that the parents' due process complaint notice did not include any allegations concerning the September 2021 IEE. The district further argues that the parents do not point to any evidence in the hearing record demonstrating how any issues related to the September 2021 IEE report were raised at the impartial hearing. The district asserts that the IHO properly addressed the fact that, at the time of the June 2021 CSE meeting, the results of the September 2021 IEE were not available for consideration. In addition, the district contends that State regulations did not require the presence of the IEE evaluator at a CSE meeting. To the extent that the September 2021 IEE results were not listed in any subsequent IEPs, the district asserts that, as a procedural violation, it does not warrant reversing the IHO's finding that the district offered the student a FAPE. Moreover, the district points to testimonial evidence averring that the September 2021 IEE report had been reviewed and that the recommendations in the IEE report had already been implemented; as a result, there was no need to reconvene a CSE. The district also asserts that the hearing record is devoid of evidence that the parents requested a CSE meeting related to the district's receipt of the September 2021 IEE report, or that, had a CSE convened, any new information would have been presented regarding the student's needs or abilities.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on

technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

At the outset, the evidence in the hearing record demonstrates that the district reevaluated the student in April 2021 (see generally Dist. Ex. 19). Thereafter, the parents requested an IEE at district expense after the district's April 2021 psychoeducational evaluation, which resulted in the September 2021 IEE report received by the district in October 2021 (see Tr. pp. 152, 352, 455, 1166, 1474-75; see generally Parent Ex. K). In the decision, the IHO determined that the September 2021 IEE report was not available at the time of the June 2021 CSE meeting, and therefore, for the purposes of analyzing whether the June 2021 IEP offered the student a FAPE for the 2021-22 school year, the September 2021 IEE report could not be considered (see IHO Decision at pp. 10-11).

Nevertheless, once the district received the September 2021 IEE report, State and federal regulations mandate that, as the parents argue, a CSE must consider IEEs whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakistic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

In the decision, although the IHO correctly determined that the June 2021 CSE could not consider the testing results in the September 2021 IEE report because the district did not receive a copy of the report until well into fall 2021, the IHO did not otherwise grapple with whether the district considered the September 2021 IEE report at any point after receiving it in October 2021, and what affect, if any, resulted from the alleged failure to consider the IEE report (see IHO Decision at pp. 8, 10-16). Not reviewing this portion of the parents' claims was error; however, as discussed below, a failure to consider the IEE does not rise to the level of a denial of a FAPE under the circumstances presented.

Upon review, the evidence in the hearing record does not support a finding that the district considered the September 2021 IEE results, other than establishing that both the former director and a district school psychologist had reviewed it upon its receipt (see Tr. pp. 201-02). For example, at the impartial hearing, the former director testified that, after receiving the student's September 2021 IEE report, she shared it with the district school psychologist to determine whether the district needed to "go back to a CSE" (Tr. pp. 201-02). The former director further testified that, after reviewing the IEE report, "we felt like we had pretty much everything addressed" and "[w]e did not have access to the student so we didn't feel the need to reconvene" the CSE (Tr. p. 202). More specifically, the former director testified that "some of the adjustments" that had already been made to the student's program in June 2021—pointing to the use of a calculator and "more written expression pieces"—which had, according to the former director, "primarily covered" the recommendations in the September 2021 IEE report (Tr. pp. 202-03). She also noted that "there was a recommendation for specific programs, [and] writing programs," but explained that "without having a student it would be hard to make a determination for additional support" (Tr. p. 203).

This testimony, alone, is insufficient to establish that the September 2021 IEE report was considered in the decision-making process regarding the student's special education programming, which ultimately violates State regulation. Nevertheless, while the parents appear to argue that the district's failure to adhere to State regulation—as a substantive requirement in the development of an appropriate IEP—warrants a per se finding that the district failed to offer the student a FAPE, the parents do not cite to any legal authority for this proposition or to any legal authority that supports overturning the IHO's findings on this basis alone.

As a procedural violation, it is well settled that an administrative hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Turning first to whether the failure to consider the September 2021 IEE significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, a review the hearing record does not support this conclusion. This is especially true where, as here, the parent specifically declined to participate in the decision-making process regarding the development of the student's April 2022 IEP, which took place subsequent to the district's receipt of the September 2021 IEE report and at which point the parent could have raised any questions or concerns about the IEE report at the CSE meeting (see Parent Ex. N at p. 1; see also Parent Ex. J at p. 1 [indicating that the parent declined to provide any input regarding the student's special education programming]). In addition, the January 2023 IEP does not reflect that the parents raised any questions or concerns about the September 2021 IEE report at that CSE meeting (see Parent Ex. U at pp. 1-2). With respect to whether the district's failure to consider the September 2021 IEE report impeded the student's right to a FAPE or deprived the student of educational benefits, as discussed below, the hearing record does not support these conclusions.

As a final point, even though the evidence in the hearing record does not support a finding that the district considered the September 2021 IEE report, it is well settled that a CSE is not obligated to afford IEEs or privately obtained evaluations any particular weight or adopt the

recommendations set forth within an IEE or privately obtained evaluations. Thus, if the evidence had supported a finding that the district had considered the September 2021 IEE report, it would not follow that the CSEs would have been bound by the recommendations in the IEE report.

C. June 2021, April 2022, and January 2023 IEPs

On appeal, the sole issue raised in the request for review regarding the IHO's findings concerning the substantive appropriateness of the June 2021, April 2022, and January 2023 IEPs is the absence of a recommendation for specialized writing instruction. The parents assert that the IHO erred by improperly relying on retrospective testimony to find that the IEPs addressed the student's written expression needs through the resource room program, which was recommended in the June 2021, April 2022, and January 2023 IEPs. According to the parents, the student required specialized writing instruction due to her below average test scores on the written expression subtest, as determined during the September 2021 IEE.

The district asserts that, contrary to the parents' contentions, the student's written language scores fell within the average range in the September 2021 IEE, and at the impartial hearing, the evaluator who conducted the IEE testified that the student's written language score of "88" was "within normal limits," which contradicted the information as characterized in the September 2021 IEE report. In addition, the district argues that the IHO did not rely on retrospective testimony to conclude that the student's writing instruction would be addressed through resource room. Instead, the IHO properly noted that the student received writing support through her IEP, which included an annual goal, ICT services in ELA, the use of a graphic organizer, and the use of a word processor.

It is well settled that the determination of whether an IEP offers a FAPE must be made by evaluating the IEP "prospectively as of the time of its drafting" (R.E., 694 F.3d at 186). The IHO's approach in this case, which relied, in part, on testimonial evidence explaining that the student's writing needs would be addressed in resource room, appears to improperly rely on retrospective testimony—an approach rejected by the Second Circuit (R.E., 694 F.3d at 184-88 [explaining that, with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). However, the Second Circuit has rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 186-87; J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *18 n.23 [S.D.N.Y. Nov. 17, 2015] [noting that "[i]t is appropriate to rely on evidence explaining how specific IEP requirements would operate in practice to achieve the IEP's required academic needs, even if it is not appropriate to rely on evidence claiming that a student would receive services above and beyond what the IEP requires on its face"] [emphasis in original]). Moreover, the Second Circuit's holding in L.O. v. New York City Department of Education, 822 F.3d 95 (2d Cir. 2016), reaffirmed R.E.'s rule that the "IEP must be evaluated prospectively as of the time of its drafting" (L.O., 822 F.3d at 114-15). Accordingly, the analysis of whether an IEP offers a FAPE focuses on the information available to the CSE at the time the IEP was developed.

Regarding the student's needs in writing, the IHO failed to conduct a prospective analysis of whether the IEPs were appropriate at the time that they were drafted based on the information

before the respective CSEs (IHO Decision at pp. 11-16). Instead, the IHO focused on testimonial evidence that the district would have addressed the student's writing needs in resource room, which, while listed as a recommendation in the student's June 2021, April 2022, and January 2023 IEPs, was specifically described in the IEPs as addressing the student's executive functioning and organizational skills and to generalize the reading skills the student learned in isolation (see Parent Exs. J at p. 6; N at p. 8; U at p. 8). Thus, testimonial evidence that the student would work on a writing annual goal in resource room—which the IHO found to be evidence of the student receiving specialized reading instruction—together with testimony that the student's writing needs would be "worked on in resource room" was impermissibly retrospective in that it related to "additional services beyond those listed in the IEP" (R.E., 694 F.3d at 186; see Tr. pp. 230, 399-400, 417-19, 953-54, 966-67, 970, 1179-80; IHO Decision at pp. 11-16).²⁶

Nevertheless, without factoring in the retrospective evidence relied on by the IHO, the evidence in the hearing record supports a finding that the recommendations in the student's June 2021, April 2022, and January 2023 IEPs appropriately addressed the student's writing needs, and there is no basis to disturb the IHO's findings that the student's IEPs for the 2021-22, 2022-23, and 2023-24 school years offered the student a FAPE.

Before turning to the recommendations in the student's IEPs that addressed the student's writing needs, the parents' argument related to the student's written expression testing results in the September 2021 IEE will be addressed. Results of the September 2021 IEE indicated that the student demonstrated "average scores on the verbal comprehension, fluid reasoning, and working memory indices" (Parent Ex. K at p. 18). The September 2021 IEE also indicated the student achieved a "low average score on a measure of cognitive efficiency," as well as a "low score on a measure of perceptual speed and number facility" (id.). As reflected in the IEE report, the evaluator found that the student "require[d] more time than her peers when constructing responses in each academic area," along with "frequent, regular breaks to keep her engaged with the material" (id.).

The September 2021 IEE indicated the student demonstrated "deficits in basic reading skills," but that "her ability to comprehend and understand passages was in the average range" (Parent Ex. K at p. 18). According to the September 2021 IEE, the student demonstrated "average performance on phonemic awareness, below average abilities on verbal fluency and visual perception, well below average performance on morphological processing, and extremely below average performance on orthographic processing" (id.). Based on these results, the evaluator diagnosed the student as having a specific learning disorder with impairment in reading (id. at p. 19).

In addition, the September 2021 IEE report noted that the student had been diagnosed as having a specific learning disorder with impairment in mathematics (Parent Ex. K at p. 19). This diagnosis was based on the student's "very limited performance" on the math achievement testing, which indicated the student obtained scores within the "very low range" on "retrieval of basic math

²⁶ For example, when asked upon redirect examination whether other supports were available to the student to address writing needs besides the ICT services or accommodations, the former director testified that "any writing concerns . . . would be worked on in a resource room" (Tr. pp. 399-400).

facts" and her "basic calculation skills" fell within the "well below average range" (id.). The September 2021 IEE further indicated the student's "ability to compute problem solving questions was found to be in the average range" although the student "benefited from the questions being read aloud" (id.).

In writing, the September 2021 IEE reflected that the student demonstrated "average" skills in her ability to "construct simple and complex sentences," while her ability to "construct complex sentences, adhering to grammar and syntax, [was] compromised" (Parent Ex. K at p. 19). According to the September 2021 IEE report, the student demonstrated "below average" spelling skills, and "she appear[ed] to get stuck on how to spell words and ch[ose] simple language to avoid spelling more difficult words" (id.). With regard to the student's scores on written language subtests, the September 2021 IEE reflects that she obtained a standard score of "88" on the spelling subtest, which the evaluator characterized as below average (id. at p. 13). However, at the impartial hearing and contrary to the parents' contention on appeal, the evaluator testified that, based on her IEE report, a standard score of 88 fell "within normal limits" (id. at p. 8; Tr. pp. 1897-98). On the sentence writing fluency subtest—which assessed her ability to formulate and write simple sentences quickly—the student obtained a standard score of "90," falling within the average range (Parent Ex. K at p. 14). On the writing samples subtest, the student achieved a standard score of "92," which fell within the average range (id.).

The September 2021 IEE specified recommendations for the student to receive "evidence-based interventions within the areas of reading, writing, and mathematics that include[d] a special educator with the necessary certifications and expertise to deliver appropriate intervention" (Parent Ex. K at p. 20). The evaluator included examples of possible evidence-based programs in the September 2021 IEE report, such as the "Wilson Reading System," the "Hochman method" for writing, and "Math in Focus" (id. at pp. 21-23). Further, the September 2021 IEE indicated the student would "benefit from adding study skills, writing, spelling, and mathematics goals [to] her IEP" (id. at p. 20).

To address writing needs, the September 2021 IEE report included recommendations for the student to use graphic organizers, assistive technology, an editing checklist, and teacher check-ins (see Parent Ex. K at p. 22). The evaluator also noted that the student would benefit from practicing writing skills, "focusing on express of ideas, semantics, and mechanics," and would "likely perform better when she discusse[d] her ideas aloud first" (id.). Further, the September 2021 IEE included a recommendation that the student not be "penalize[d] for poor spelling" (id.). In terms of the student's needs in mathematics, the September 2021 IEE recommended an IEP annual goal focused on "math calculation," access to a calculator, practice to address math fluency skills, and "multiple examples" that demonstrated "how to solve problems" (id. at p. 23).

Overall, the student's performance on written expression subtests, while revealing relative weaknesses in spelling and constructing more complex sentences, does not automatically correlate to requiring specialized writing instruction to address these needs in order for the district to have offered the student a FAPE.

Next, a review of the special education the district recommended to address the student's writing needs in her IEPs demonstrates that the IHO properly concluded that the June 2021, April 2022, and January 2023 IEPs adequately addressed her needs and offered the student a FAPE.

According to the June 2021 IEP, the student "avoid[ed] written assignments" when possible because "[w]riting [was] a less desired task" (Parent Ex. J at p. 3). The June 2021 IEP indicated that while the student's sentences were "grammatically correct," they were "often [] run-on sentences" (id.). The June 2021 IEP also indicated that the student's "spoken vocabulary [was] within normal limits," but she "often wr[o]te using simple language" (id.). The June 2021 IEP reported that the student required assistance to generalize learned skills "in reading to her everyday spelling and writing" and that she "need[ed] to develop the ability to write using varied content-specific vocabulary and complex sentence structures" (id. at pp. 3-4).

In her testimony, the district reading teacher offered that she shared the student's progress on her annual goals for the 2020-21 school year during the June 2021 CSE meeting, and assisted in the development of the student's annual goals for the 2021-22 school year (see Tr. pp. 958-59; Parent Ex. J at pp. 5-6). The reading teacher testified that one writing goal included in the June 2021 IEP was something that would be worked on in both ELA and resource room and that she had likely "collaborated with one or more of [the student's] other teachers to create" the annual goal (Tr. pp. 966-67, 969). Specifically, the reading teacher testified that she "observ[ed]" that the student "express[ed] herself in much more complex ways and us[ed] much more complex vocabulary when she was [not] writing" (Tr. p. 969). Further, the reading teacher testified that a second writing annual goal was added that "raised the bar" for the student, who answered inferential questions verbally, but needed to do "the same task in writing" (Tr. p. 970; see Parent Ex. J at p. 6).

The former director testified that because the student was entering ninth grade in the 2021-22 school year and the social studies course involved "more intense" writing, the June 2021 CSE decided to recommend ICT services for social studies to support the student's reading and writing needs (Tr. pp. 155, 179). She also testified that the graphic organizer recommended in the June 2021 IEP "assist[ed]" the student "with writing" or as a means to approach learning tasks (Tr. p. 198). The former director described a "graphic organizer [as] a way to organize thoughts and assist with written expression" (id.). According to the former director, as indicated in the June 2021 IEP, the student required assistance with organizing her thoughts "before writing in order to get a deeper and more thematic continuity in her writing," and the "graphic organizer [was] just a different way" to achieve that (id.). The former director testified that the student's writing needs were also addressed through the use of a word processor and the ICT services in ELA (see Tr. p. 217).

With respect to the development of the student's April 2022 IEP, the CSE relied, in part, on Landmark progress reports, and noted therefrom that the student "offered excellent oral text analyses" in class, and "used the five-step writing process" to prepare written material (Dist. Exs. 29 at p. 2; 30 at p. 2). The Landmark progress reports indicated they addressed the student's ability to prepare "fluent," "nuanced," and clear written responses (Dist. Exs. 29 at p. 2; 30 at p. 2). The October 2021 Landmark report indicated the student "receive[d] teacher guidance on how to elaborate on key details in her writing" (Dist. Ex. 29 at p. 4). The October 2021 Landmark report also described that the student benefited from the use of graphic organizers (id. at p. 2).

According to the April 2022 IEP, the student demonstrated "literal and abstract comprehension," as well as "the ability to answer inferential and evaluative questions" verbally, although she "struggle[d] to" answer such questions "in writing" (Parent Ex. N at p. 4). In addition, the April 2022 IEP indicated that the student "avoid[ed] written assignments" when possible

because it was "a less desired task" (*id.*). Further, the April 2022 IEP indicated the student "often ha[d] trouble beginning a writing assignment, but" started one "with one-on-one help from the teacher" (*id.* at p. 5). The April 2022 IEP described that the student's writing consisted of "simple language," though her sentences were "grammatically correct" (*id.* at p. 4). The April 2022 IEP also indicated the student "use[d] run-on sentences" and "benefit[ed] from teacher guidance on how to elaborate on key details in her writing" (*id.* at pp. 4-5).

The April 2022 IEP included annual goals targeting the student's ability to spell multisyllabic words, write a paragraph of five to seven sentences, answer inferential and evaluative questions in writing, and read 135 words per minute with accuracy (*see* Parent Ex. N at p. 7).

According to the former director, writing was "embedded into" the ICT services in ELA, which meant that the student had the "additional support" of a special education teacher and she would use the "writing process to approach written expression which generally would be done as well in the general education setting by the general education teacher" (Tr. p. 228). The student received the "additional support" to address writing from "the special education teacher" within the ICT classroom (*id.*). At the impartial hearing, the parent confirmed that the CSE had explained previously that the ICT services and extra support the student needed at the time were also embedded within the district's program (*see* Tr. pp. 1754-55).

Turning to the January 2023 IEP, it was noted that, at Landmark, the student had used a "five-step writing process to compose [one] paragraph compositions" (Parent Ex. U at p. 5). The January 2023 IEP indicated the student "benefit[ed] from setting academic goals and verbally processing parts of her writing with her instructor" (*id.*). According to the January 2023 IEP, the student "required multiple prompts to provide adequate details and elaborations when answering verbal or written questions" (*id.*). Based on the Landmark progress report, the January 2023 IEP indicated that the student's needs included an increase in her ability to be "specific and detailed in her writing," "demonstrate both literal and inferential comprehension of what she [] read in writing," and "increase her rate of reading at her independent reading level" (*id.*).

The January 2023 IEP included the following annual goals: to write a three-paragraph essay, demonstrate her understanding of a passage "by answering inferential and evaluative questions in writing," and read "140 correct words per minute" "at her independent reading level" (Parent Ex. U at pp. 7-8). The evidence does not lead me to conclude that the IEPs set such a low bar for the student that they failed to meet the standard for a FAPE as expressed by the Supreme Court in Andrew F. insofar as they took into account the student's circumstances when they were created and they were clearly designed to enable the student to progress, even if the parents found them to be less than ideal.

Based on the foregoing evidence, the IHO correctly found that the June 2021, April 2022, and January 2023 IEPs appropriately addressed the student's identified writing needs, and, as a result, offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the IHO properly concluded that the district offered the student a FAPE in the LRE for the 2021-22, 2022-23, and

2023-24 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Landmark was an appropriate unilateral placement for the student or whether equitable considerations favor the parents' request for relief (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 23, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**